

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD BROWN JR.,

Defendant-Appellant,

UNPUBLISHED

April 25, 1997

No. 177683

Detroit Records' Court

LC No. 93-013955

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONYAL WESLEY,

Defendant-Appellant,

No. 177861

Detroit Records' Court

LC No. 93-013955

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANA FREEMAN,

Defendant-Appellant.

No. 178364

Detroit Records' Court

LC No. 93-013955

* Circuit judge, sitting on the Court of Appeals by assignment.

Before: Young, P.J., and Gribbs and S. J. Latreille,* JJ.

PER CURIAM.

In these consolidated appeals, defendants were convicted, following a jury trial, of the burning of a dwelling house, MCL 750.72; MSA 28.267. Defendants appeal as of right from their convictions. We affirm.

This case arises out of the November 27, 1993, firebombing of a house in the city of Inkster. The house was occupied by Kimberly Fox, an acquaintance of defendants. On the day of the arson, Fox, who admitted to having engaged in drug transactions with some or all defendants, had been involved in an argument with each of them. All three left her house together in defendant Wesley's car, with Wesley issuing the threat: "[W]e're gonna smoke this bitch out." Later that evening, Fox's house was hit by four firebombs. Upon fleeing the house, Fox saw defendants, along with a fourth man, running from the scene, then observed Wesley's car drive away. Minutes after the firebombing, Wesley's car was stopped by police and defendants were arrested. In the car, police found empty bottles similar to those which were thrown as firebombs and a can of gasoline.

On appeal, defendants Freeman and Brown claim that the trial court abused its discretion by limiting their right to cross-examine Fox to such an extent as to violate their constitutional right to confrontation, US Const VI; Const 1963, art 1, § 20. We disagree. A trial court may control the interrogation of witnesses to assist in an effective ascertainment of the truth, to avoid needless consumption of time, and to protect witnesses from harassment. MRE 611(a). The scope of cross-examination is a matter for the sound discretion of the trial court. *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985). However, that discretion must be exercised with regard to defendant's constitutional right to confrontation. *Id.*, 566. Where a court prevents a defendant from placing before the jury facts supporting an inference of bias, prejudice or lack of credibility, there has been an abuse of discretion and may constitute a violation of the defendant's right to confrontation. *Id.* In such a case, a conviction based on the testimony of the witness that the defendant was not allowed to fully cross-examine should not be sustained. *Id.*, 566-567. Though failure to allow adequate cross-examination constitutes error, reversal is only required where the error is found not to be harmless. *Id.*, 567.

Here, the prosecution's case rested almost exclusively on the testimony of Fox concerning what she saw on the night of the firebombing and her credibility. Wesley's counsel cross-examined Fox first, and then she was cross-examined by counsel for the other defendants. Wesley's counsel conducted an exhaustive and repetitive examination of Fox. During this portion of the cross-examination, it was clearly established that Fox had changed her testimony from that given at the preliminary examination concerning where she was in the house at the time of the firebombing. When Brown's attorney continued to question Fox on her preliminary examination testimony and attempted several times to get her to admit to lying under oath, Fox left the stand and exited the courtroom.

After Fox returned to the stand, the court took a more active role in attempting to minimize the redundancy of the questioning and the harassment of the complaining witness. In several instances, the trial court cut off the attempts of Brown's attorney to return to the issue of where Fox was when the bombs struck. Additionally, the court, in the interest of time, urged counsel to move on to new areas when his questions asked for information which had been repeatedly given. During cross-examination by Freeman's counsel, the court on two occasions asked counsel to move on after an objection to redundant questioning by the prosecutor and complaints by the witness.

We find that defendants were not substantively limited in their cross-examinations of Fox. In each instance cited by defendants, the court was properly exercising its authority of controlling the proceedings to avoid countless redundancies and the needless consumption of time. MRE 611(a). Also, we find the court's actions justified since much of the redundant questioning was simply argumentative or intended to harass the witness. MRE 611(a). Moreover, defendants have not identified, and this Court could not find, any prejudice from the alleged limitation on cross-examination. There were no factual areas which defendants were precluded from examining, and each aspect of Fox's testimony was exhaustively covered by all three defense counsel. Hence, we conclude that the trial court did not abuse its discretion in controlling the scope of the cross-examination of Fox.

Defendant Brown and Freeman also claim judicial misconduct on the basis of the trial court's interjection of numerous questions during the cross-examination of Fox. We disagree. A trial court has broad discretion to control trial conduct. *People v Paquette*, 214 Mich App 336, 340; ___ NW2d ___ (1995). The primary limitation on this discretion is that the court's actions must not pierce the veil of judicial impartiality. *Id.*; *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). A trial court pierces the veil of judicial impartiality, and thereby abuses its discretion, where its conduct, questions and comments unduly influence the jury, depriving the defendant of a fair trial. *Paquette, supra*, 214 Mich App 340; *Davis, supra*, 216 Mich App 50. When the trial court is found to have abused its discretion in this manner, this Court applies a harmless-error test to determine if reversal of the defendant's conviction is required. *Davis, supra*, 216 Mich App 51.

It is well settled that a trial court may question witnesses to "clarify testimony or elicit additional relevant information," so long as the court exercises caution and restraint to ensure that the questions are not intimidating, prejudicial, argumentative, unfair, or partial. *Davis, supra*, 216 Mich App at 49-50, (quoting *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992)). This Court has noted that a determination of whether a trial court has pierced the veil of judicial impartiality in its questioning may turn on whether the questions were posed in a neutral manner and neither added to, nor distorted the evidence. *Id.*, 50. Moreover, the court should not assume the prosecutor's role, utilizing advantages unavailable to the prosecution. *Id.*

The court's questions in this case did not pierce the veil of judicial impartiality. The questions were primarily focused on clarifying the confusing testimony given during a repetitious and confusing examination of a witness who displayed a lack of credibility in certain areas. The questions directed to new areas were designed to elicit additional information relevant to enhancing the search for the substantive truth. All of the court's questions were posed in a neutral manner and neither added to, nor

distorted the evidence previously given. The questions demonstrate no partiality and do not support a conclusion that the court was attempting to assume the role of prosecutor. Hence, we conclude that the court did not abuse its discretion.

With respect to Brown's further assertion that the trial court inadvertently used the term "defendants" on one occasion, we find no error. There was no issue with respect to the identification of defendants at trial. Fox testified that she was previously acquainted with all three defendants prior to the firebombing. Additionally, she testified consistently that she observed defendants running from the house after the incident. The evidence also indicated that she identified defendants by name and description in her statement to police moments after the bombing. Therefore, contrary to Brown's assertion, the court's inadvertent remark had no weight in bolstering Fox's identification of defendants.

Next, defendants Freeman and Wesley assert that there was insufficient evidence to support the jury's finding of guilt with respect to the charges against them. We disagree. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether it was sufficient to support a conclusion by the trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990). The evidence was sufficient in this case the verdict was not against the overwhelming weight of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 2d 603 (1990).

Viewing the evidence in a light most favorable to the prosecution, we find it was sufficient to establish that Freeman participated in the firebombing. He joined with Wesley and Brown immediately upon Wesley's suggestion that the three of them would burn down Fox's house. He was in close proximity to an area where one of the firebombs landed and fled the scene immediately after the firebombs hit along with Wesley and Brown. Moments later Freeman was arrested while in the company of Wesley and Brown, and in the presence of materials similar to those used in the firebombing. This evidence supports a reasonable inference that Freeman firebombed the house or at least assisted the other defendants in firebombing the house.

With respect to Wesley, taken most favorably to the prosecution, the evidence supports a reasonable inference Wesley either perpetrated the firebombing or, encouraged or assisted in its perpetration. His threat earlier in the day was the impetus for the firebombing, at a minimum urging his codefendants to commit the act. His proximity to the location where the firebombs were thrown, his immediate flight from the area and possession of materials applicable to making firebombs support an inference that he actually participated in throwing one or more firebombs at the house. Moreover, the use of Wesley's car to provide a means of transportation to and from the scene for the perpetrators raises an inference that he at least assisted the perpetrators in their actions. Finally, contrary to Wesley's assertion, there was sufficient identification evidence. Fox testified to being well acquainted with Wesley and recognizing him as he fled the scene. Clearly, there was no identification issue with respect to Wesley. Therefore, we conclude that there was sufficient evidence for the jury to conclude that Wesley was guilty of arson.

Finally, Brown claims that the prosecutor's statements that Brown issued the threat to burn down Fox's house denied him a fair trial. We disagree. Brown failed to object the comments at trial, therefore, review is precluded, unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found where the prejudicial effect of the improper remarks could have been cured by a timely instruction. *Id.* Review of an issue of prosecutorial misconduct is done on a case by case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We examine the pertinent record from the lower court and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *Legrone, supra*, 205 Mich App 82-83.

A prosecutor may not make statements of fact to the jury which are unsupported by the evidence. *Stanaway, supra*, 446 Mich App 686. Brown first objects to the prosecutor's indication during opening statements that the evidence would show that he and Wesley threatened to "smoke out" Fox. At trial, Fox testified that Wesley, in the company of Brown and Freeman, stated: "We're gonna smoke this bitch out." Since this remark infers a collective threat, we find that the prosecutor's comment during opening statement is was based on the evidence and was otherwise made in good faith. Therefore, we conclude that no reversal is required. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

During closing argument, the prosecutor stated that Brown made the threat to Fox. This statement was made immediately after the prosecutor remarked that he was not sure who made the threat. Clearly, this error could have been cured by a timely objection. Therefore, no miscarriage of justice is present. *Stanaway, supra*, 446 Mich 687. Moreover, in light of the evidence against defendant, we find that no prejudice resulted from this error.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Roman S. Gibbs
/s/ Stanley J. Latreille